NO. 15120

United States
COURT OF APPEALS
for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

v.

THE UNITED STATES NATIONAL BANK OF PORTLAND (OREGON), Executor of the Estate of SAM J. WILSON, Deceased, and JESSIE WILSON,

Appellees.

On Appeal from the Judgment of the United States District Court for the District of Oregon

BRIEF FOR THE APPELLANT

JOHN N. STULL,
Acting Assistant Attorney General.

C. E. LUCKEY,
United States Attorney.

EDWARD J. GEORGEFF,
Assistant United States Attorney.

ROBERT N. ANDERSON,
HARRY BAUM,
DAVID O. WALTER,
Attorneys,
Department of Justice,
Washington 25, D. C.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE., 8-20-56—45

FILED

INDEX

CITATIONS

Page

Cases

CITATIONS (Cont.)

CITATIONS (Cont.)

United States
COURT OF APPEALS
for the Ninth Circuit

NO. 15120

UNITED STATES OF AMERICA,

Appellant,

v.

THE UNITED STATES NATIONAL BANK OF PORTLAND (OREGON), Executor of the Estate of SAM J. WILSON, Deceased, and JESSIE WILSON,

Appellees.

On Appeal from the Judgment of the United States District Court for the District of Oregon

BRIEF FOR THE APPELLANT

OPINION BELOW

The memorandum of decision, findings of fact, and conclusions of law of the District Court (R. 35-42) are not officially reported.

JURISDICTION

This appeal involves income tax for the year 1949 in the amount of $361,852.06 plus interest. The tax in

dispute was paid on August 27, 1954 (R. 40). Claim for refund was filed on September 8, 1954, and rejected by notice dated January 5, 1955 (R. 41). Within the time provided in Section 6532 of the Internal Revenue Code of 1954 and on March 28, 1955, the taxpayer brought an action in the District Court for recovery of the tax paid (R. 3-9). Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346. The judgment was entered on December 8, 1955 (R. 43-44). Within sixty days and on February 6, 1956, a notice of appeal was filed (R. 44-45). Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED

Whether the District Court erred in holding that the value of the property received by decedent in settlement of a lawsuit represented a nontaxable division of the assets of a joint venture, rather than taxable income.

STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains

or profits and income derived from any source whatever.

* * *

(26 U.S.C. 1952 ed., Sec. 22.)

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

* * *

(13) *Partnerships.*—* * * If the property was distributed in kind by a partnership to any partner, the basis of such property in the hands of the partner shall be such part of the basis in his hands of his partnership interest as is properly allocable to such property.

* * *

(26 U.S.C. 1952 ed., Sec. 113.)

SEC. 3797. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * *

(2) *Partnership and Partner.* — The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization.

* * *

(26 U.S.C. 1952 ed., Sec. 3797.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

Sec. 29.42-1. *When included in Gross Income.*— (a) *In general.*— * * * If a person sues in one year on a pecuniary claim or for property, and money or property is recovered on a judgment therefor in a later year, income is realized in the later year, assuming that the money or property would have been income in the earlier year if then received. * * *

Sec. 29.113(a)(13)-2. *Readjustment of Partnership Interests.*—When a partner retires from a partnership, or the partnership is dissolved, the partner realizes a gain or loss measured by the difference between the price received for his interest and the sum of the adjusted cost or other basis to him of his interest in the partnership plus the amount of his share in any undistributed partnership net income earned since he became a partner on which the income tax has been paid. * * * If the partnership distributes its assets in kind and not in cash, the partner realizes no gain or loss until he disposes of the property received in liquidation. The basis of such property in the hands of the partner shall be such part of the basis in his hands of his partnership interest as is properly allocable to such property.

* * *

STATEMENT

Taxpayers here are the executor of the estate of Sam J. Wilson, deceased, and his widow. The controversy concerns the taxable nature of certain transfers of timberlands to Wilson in 1949. The facts may be summarized as follows:

In 1943 Wilson entered into an oral agreement, the nature of which is here in dispute, with Samuel A. Agnew, under which Wilson located various timberlands, recommended their purchase to Agnew, and arranged for their

purchase. Agnew supplied the funds for the purchase of the lands and the purchases were made in his name. This arrangement continued until some time in 1946, when a disagreement arose between Wilson and Agnew (R. 37-38).

In July, 1948, Wilson instituted suit against Agnew in the Superior Court of the State of California for the County of Del Norte, alleging that his arrangement with Agnew was a joint venture, that under the terms of it the timberland had been purchased for resale at a profit, that he was entitled to 50% of the profit on land acquired at tax sales and 20% of the profit on land acquired from private owners. He prayed that the joint venture be established, that his interests be determined, and that there be a liquidation by sale or division in kind. Agnew denied the existence of the joint venture, and in a cross-complaint alleged that Wilson had used Agnew's money to purchase lands in his own name and had diverted to his own use sums advanced by Agnew for the purchase of land for Agnew (R. 15-17, 38-39). Agnew also filed suit in the same court, alleging a breach by Wilson of a separate agreement relating to the purchase of a hotel (R. 17-18).

After one day of trial of the consolidated cases, the dispute between the two was settled. The stipulation of settlement provided in part that Agnew was to convey to Wilson a tract of timber located in Curry County, Oregon, and a tract located in Humboldt County, California. Pursuant to the settlement Wilson also retained $25,000 previously advanced by Agnew (R. 19, 39). Wil-

son was to convey to Agnew a tract of land purchased in his own name (R. 19). All pending litigation between the parties was to be dismissed and all claims released (R. 39, 186). The settlement was carried out.

In their joint income tax return for the year 1949 Wilson and his wife, Jessie Wilson, reported the $25,000 cash as income for that year, but treated the receipt of the tracts of land as a nontaxable dissolution of a joint venture (R. 40).

Under date of July 14, 1954, the Commissioner notified taxpayers of a deficiency for 1949 in the amount of $361,852.06 and an over-assessment for 1950 for $16,-789.84. The basis for the deficiency was the assertion that 70% of the fair market value of the timberlands conveyed to Wilson by Agnew (the remaining 30% being received by the attorneys for Wilson) constituted the receipt by Wilson of compensation for services rendered rather than the receipt of property in dissolution of a joint venture (R. 40). The net amount assessed, plus interest was paid by taxpayer, The United States National Bank of Portland (Oregon), as executor of the estate of Wilson, claim for refund was duly filed and disallowed, and this action followed (R. 40-41).

The principal issue in the court below was as to the taxable nature of the transfer of the timberlands from Agnew to Wilson in 1949. The court held that the agreement between Wilson and Agnew was one of joint venture (R. 35, 37-38), that the agreement of settlement was a dissolution of the joint venture (R. 41), and that the conveyance of the timberlands was a nontaxable

division in kind of the assets of a joint venture (R. 41, 42).

A second issue before the court was as to the fair market value of the tracts in question, to be determined if the court should decide that their fair market value constituted compensation for personal services or other income to Wilson (R. 29). The court made no determination of this issue.

A third issue, also to be determined in the event that the timberlands constituted compensation to Wilson, was as to the length of time over which those services were performed. If over three years, then the benefits of Section 107(a) of the Internal Revenue Code of 1939 were applicable (R. 29). The court found that Wilson performed personal services, commencing in January, 1943, and continuing until June, 1946 (R. 38).

STATEMENT OF POINTS TO BE URGED

1. The court below erred in finding, contrary to the evidence and to the law applicable to joint ventures, that Wilson entered into a joint venture with Agnew (Finding III, R. 37), that Wilson performed the agreed personal services for a joint venture (Finding IV, R. 38), and that the settlement agreement effected the dissolution of a joint venture (Finding X, R. 41).

2. In finding (Finding X, R. 41) that the conveyance of the timberlands to Wilson did not constitute a distribution of profits or anticipated profits, the court erred for the reasons that there was no joint venture and,

alternatively, that the settlement was of a claim for profits.

3. In deciding (Conclusion I, R. 42) that the agreement between Agnew and Wilson of November 14, 1949, constituted a nontaxable division in kind of the assets of a joint venture and that the fair market value of the settlement proceeds did not constitute compensation for Wilson's personal services, the court below erred for the reasons that there was no joint venture and, alternatively, that the conveyance was part of a settlement of a claim for profits only.

4. In deciding (Conclusion II, R. 42) that the fair market value of the timberlands conveyed to Wilson in the year 1949 did not give rise to the receipt by him in that year of taxable income, the court below erred for the reason that the evidence shows that the conveyance was compensation for personal services.

5. In the alternative, the court below erred in failing to decide that the fair market value of the property and cash received by Wilson under the settlement represented loss of anticipated profits taxable under Section 22(a) of the Internal Revenue Code of 1939, for the reason that the claim in the state court proceeding was for profits.

7. The trial court erred in entering judgment for the taxpayers.

SUMMARY OF ARGUMENT

The District Court's conclusion that the arrangement between Wilson and Agnew was one of joint venture, and that consequently the value of the property received by Wilson in settlement of the lawsuit represented a nontaxable division of the assets of a joint venture, is without support in the record and clearly erroneous. Among the essential elements of a joint venture are the sharing of losses as well as profits, a joint proprietary interest in the assets of the enterprise, and the right of joint control of the common enterprise. The record fails to establish the existence of any of these prerequisites, and accordingly taxpayer failed to meet the burden of proving the existence of a joint venture. On the contrary, the record affirmatively shows that the arrangement in question was one of employment, whereby Wilson was to furnish services for Agnew in locating and purchasing timberlands for resale, for which he was to receive compensation measured by a percentage of the resale profits. Wilson's legal characterization of this oral arrangement as a joint venture in his lawsuit against Agnew patently does not (as the court below apparently assumed) suffice to establish the existence of a joint venture, particularly since Agnew flatly denied the creation of any such relationship. Nor is there anything in the settlement agreement itself which lends any support to the claim of a joint venture. The mere general assertion in Wilson's complaint in the state court litigation that a joint venture was created is no more determinative of the taxable nature of the amount received in settlement of the litiga-

tion than Agnew's denial of the assertion. The specific allegations of the complaint and the conduct of the parties as disclosed by their testimony make it clear that Wilson never acquired a proprietary interest in the properties purchased with Agnew's funds and in Agnew's name, but at most acquired a claim against Agnew for compensation measured by a percentage of profits to be derived from resale of the properties.

Even assuming, *arguendo,* that a joint venture did exist, the District Court erred in further concluding that the value of the property received by Wilson in settlement of the litigation constituted a division in kind of the assets of the joint venture, rather than damages for loss of profits resulting from Agnew's alleged breach of the joint venture agreement. While Wilson's suit was broad enough to embrace both aspects of recovery, the settlement agreement is completely silent regarding the basis on which the parties compromised their dispute. Taxpayer had the burden of proving that the settlement proceeds represented a nontaxable division of property owned by him as a joint venturer rather than a recovery of lost profits of the joint venture, and on the record here presented his proof falls far short of meeting that burden.

ARGUMENT

The Settlement Proceeds Represented Taxable Income, Not a Nontaxable Division of Profits of a Joint Venture

The decedent Wilson and one Agnew entered into an oral agreement in 1943 under which Wilson undertook to locate timberlands which would be suitable for profitable resale. The purchase money was to be furnished, and title was to be taken, in Agnew's name. The property was to be resold within a reasonable time and Wilson was to receive a stated percentage of any resale profits. Wilson performed the agreed services, various timberlands being purchased in Agnew's name with funds supplied by Agnew. None of the properties having been resold by 1946, a disagreement arose between the parties and thereafter Wilson brought suit against Agnew in a California court. His complaint alleged that he and Agnew had entered into an oral joint venture agreement, and that Agnew had breached the agreement by failing to resell the properties. He requested that the court declare the existence of a joint venture, that his interest be determined, and that the property either be divided in kind or liquidated and sold. Agnew denied the existence of a joint venture, and any interest of Wilson in the timberland; he also filed a cross-complaint. The litigation was terminated by a settlement agreement, pursuant to which Wilson received from Agnew cash plus certain timberlands. The settlement agreement merely provided for conveyance of the properties to Wilson and mutual exchange of releases; it was silent as to the nature of the

controversy being settled and as to what the settlement payment represented (R. 15-19, 36-41, 185-186).

If the value of the property received by Wilson in settlement of the controversy constituted compensation for his services performed for Agnew, or if it represented damages for loss of anticipated profits of a joint venture, the amount received represented income taxable to Wilson under Section 22(a) of the Internal Revenue Code of 1939, *supra*. On the other hand, if the settlement represented merely a division in kind of property owned jointly by Wilson and Agnew as joint venturers, then no taxable gain was realized by Wilson by reason of the division. See Section 29.113(a)(13)-2 of Treasury Regulations 111, *supra*.

The District Court, sustaining taxpayer's contention, summarily held that the settlement proceeds did not constitute taxable income to Wilson (except to the extent of the cash received), but represented a nontaxable division of the property of a joint venture (R. 35, 42). It is the Government's position that the decision below is clearly erroneous on either of two grounds: (1) Far from establishing that the property received in settlement of the lawsuit represented a division of the assets owned by Wilson and Agnew as joint venturers, the record shows that it represented compensation for services performed by Wilson for Agnew; (2) Even if it be assumed that the relationship of the parties was in reality that of joint venturers rather than one of employment, the record fails to show that the settlement proceeds represented Wilson's proprietary interest in the venture rather than

damages for profits lost by reason of Agnew's failure to carry out the joint venture agreement.

A. The court below erred in concluding that a joint venture, rather than an employment relationship, existed between Wilson and Agnew.

The basic controversy here is whether the arrangement between Wilson and Agnew constituted a joint venture. If it did not, then the value of the timberlands received by Wilson clearly constituted taxable compensation for personal services.*

In the court below taxpayers urged that inquiry into the question whether a joint venture existed or not was foreclosed by the settlement in the state court proceeding. The court below, in its memorandum of decision (R. 35), expressed doubt as to the applicability of the authorities relied on by taxpayers but found, independently, "on the record made," that Wilson and Agnew were engaged in a joint venture. We submit that this finding is clearly erroneous, is without support in the record, and indeed is contrary to the overwhelming weight of the evidence.

The court below disregarded established criteria for determining the existence of a joint venture. It is the general rule that among other essentials, there must be a sharing of losses as well as profits and a joint right of control. See, for example, *Gottlieb Brothers v. Culbertson's,* 152 Wash. 205, 209, 277 Pac. 447; *Beckwith v.*

*As discussed in part B, below, even if the agreement constituted a joint venture of some sort, the conveyance of the lands was not necessarily a division of its assets in kind.

Talbot, 2 Colo. 639, 645; *Burton-Sutton Oil Co. v. Commissioner,* 150 F. 2d 621, 628 (C. A. 5th); *Place v. Commissioner,* 17 T. C. 199, 206, affirmed, 199 F. 2d 373 (C. A. 6th); *Rupple v. Kuhl,* 177 F. 2d 823 (C. A. 7th); *Aiken Mills v. United States,* 144 F. 2d 23, 25 (C. A. 4th).

This court, in *Joe Balestrieri & Co. v. Commissioner,* 177 F. 2d 867, summarized the requirements of California law for a joint venture as follows (p. 871):

> Both petitioner and respondent assume, and rightly so, that California law governs as to the meaning and effect of the agreement above outlined since the contract was made in California and was to be performed and was wholly performed in that state. The courts of California, in common with other courts, have not precisely defined the term "joint adventure", but they have prescribed what are to be regarded generally as its essential elements. *Beck v. Cagle,* Cal. App. [46 C. A. 2d 152, 161], 115 P. 2d 613. Actual joint control, or at least the right of joint control of the common enterprise is an essential element of joint adventure in California. *Howard v. Societa Di Unione E. Beneficenza Italiana,* 62 Cal. App. 2d 842, 145 P. 2d 694; *Freedman v. Industrial Accident Commission,* Cal. App. [67 C. A. 2d 629], 154 P. 2d 922; *Wiltsee v. California Employment Commission,* Cal. App. [69 C. A. 2d 120], 158 P. 2d 612; *Mazzera v. Wolf,* Cal. App., 173 P. 2d 44. An arrangement whereby two or more persons share the profits of a common undertaking does not constitute a joint adventure in the absence of power of joint control. *United Farmers Ass'n v. Sakioka,* 7 Cal. App. 2d 559, 46 P. 2d 770; *Larson v. Lewis-Simas-Jones Co.,* 29 Cal. App. 2d 83, 84 P. 2d 296; *Enos v. Picacho Gold Mining Co.,* 56 Cal. App. 2d 765, 133 P. 2d 663. Where there is no common management and control of the enterprise and

> the profits are shared only as compensation or interest for the use of money advanced, no joint adventure exists. *Spier v. Lang,* 4 Cal. 2d 711, 53 P. 2d 138. The sharing of losses as well as profits has also been regarded as an essential element of joint adventure. *Stoddard v. Goldenberg,* Cal. App. [48 C. A. 2d 319, 324], 119 P. 2d 800; *Enos v. Picacho Gold Mining Co., supra.*

Howard v. Societa di Unione etc. Italiana, 62 Cal. App. 2d 842, 145 P. 2d 694; *United Farmers Ass'n v. Sakioka,* 7 Cal. App. 2d 559, 46 P. 2d 770; *Freedman v. Industrial Accident Commission,* 67 Cal. App. 2d 629, 154 P. 2d 922, and *Motion Picture Enterprises v. Pantages,* 91 Cal. App. 677, 682, 267 Pac. 550, also hold that there must be a sharing in losses.

Similarly, in Oregon it is held that there must be a sharing of losses (*Gong v. Toy,* 85 Ore. 209, 166 Pac. 50) and that sharing of profits is not enough (*First Nat. Bank of Eugene v. Williams,* 142 Ore. 648, 20 P. 2d 222; *H. H. Worden Co. v. Beals,* 120 Ore. 66, 73-74, 250 Pac. 375).

Closely similar to the arrangement between Wilson and Agnew, assuming that Wilson was in fact to share in the profits, which Agnew denied, is the arrangement involved in *Griffiths v. Von Herberg,* 99 Wash. 235, 240, 169 Pac. 587. There the plaintiff was employed to obtain a suitable building and a ten-year lease for a moving picture business, and was to receive 10% of the profits of the business. It was held to be not a joint venture, but merely a specific employment with compensation fixed by a percentage of the profits.

Turning to the evidence in the present case, it is abundantly clear that there was no joint venture here, but at most an agreement to compensate Wilson for his services by a share in the profits. We believe that this Court "on the entire evidence" will be "left with the definite and firm conviction that a mistake has been committed", and that the evidence overwhelmingly shows that Wilson merely received compensation. *United States v. Gypsum Co.*, 333 U.S. 364, 395.

The record is to be searched in vain for any evidence which supports the view that the parties contemplated that Wilson would share in any losses that might occur, for example, through a decline in the value of the timberland. Nor is there anything to support a conclusion that Wilson had any voice in the management or disposition of the timberlands once they were acquired by Agnew. The evidence consists of a deposition of Wilson, taken July 23 and 24, 1948, in the state proceedings (R. 240-329), copies of correspondence between Wilson and Agnew during the continuance of their arrangement and at the time of their dispute as to their respective rights (R. 329-390), Agnew's testimony in the state proceedings (R. 100-183), and a deposition of Agnew in the present tax case (R. 187-227).

The deposition of Wilson, while confusing as to the details of the specific transactions there inquired into, reveals that his relationship with Agnew was not that of a joint venturer. It contains nothing from which it could be inferred that Wilson was to share in the control of the property or its disposition. On the contrary, it shows

that Wilson was acting as a broker. The very most that can be said, based upon the statement that "I was to get a cut on the property" (R. 315), is that Wilson was to be paid for his services out of the profits.

As for the miscellaneous correspondence (R. 329-390), in a letter to Agnew of July 30, 1944, Wilson refers to the Lobster Creek tract which "I sold you" (R. 333). His letters of October 24 and November 7, 1944, to Agnew made various suggestions in terms which are those of an agent to his principal and not those of a joint venturer (R. 336-341). A letter of January 4, 1945, refers to "your holdings," with no indication that they are "our" holdings (R. 343). The other letters are in similar vein. (See R. 344-345, 352; 368-369, 375.)

Apparently at some time early in 1946 there arose differences between Wilson and Agnew, differences which finally resulted in the lawsuit. Wilson's letters at that time indicate his view of their arrangement. One to Agnew of June 19, 1946 (R. 361-365), reads in relevant part as follows:

> I have stuck along with you for three years and done a damn good job, if I do say so myself—bought your timber for nothing and *you* could sell out today for a couple of million profit. Now Sam, if you are willing to give me a chance to work out our original deal, I am willing to go along, otherwise I'm not much of a hand to stick along on a losing proposition that should be making money.
>
> * * *
>
> In final conclusion, I feel I have done a damn good job and it is now time I began to look out for my own interests. The timber was bought right and now is the time to sell. I have no hesitancy in pre-

dicting that within the next two to three years you can buy it back for one-half of what *you* can sell it for today.

I want you to give this a little thought. There is no hard feelings. I just feel the whole thing is too much of a one-man show. I feel I warrant your trust and with my ability and experience, I am going to be of value to somebody. (Emphasis supplied.)

On July 12 and July 28, 1946, Wilson wrote Agnew suggesting a talk about their affairs (R. 370, 371). On March 6, 1947, reminding Agnew that he always was given "first call on any timber deals" that came to Wilson's attention, Wilson wrote him about a possible purchase (R. 374-376).

In a letter of April 16, 1947, Wilson wrote Agnew demanding a settlement (R. 378-383), the letter reading in relevant part:

Now my dealings are with you, and all the properties purchased are in your name and so far as I know still are, and it is you I am looking to for a settlement.

The timber I purchased for approximately $350,000 is now worth and can be sold for more than five times that amount which you should know, Sam, any court of equity will recognize if that is the way you want it, and it is time some kind of a settlement is arrived at.

* * *

So your "people," as you refer to them, must understand that the man who made it possible to purchase this timber at the ridiculously low price referred to, is going to be paid as per our agreement.

* * *

So you will understand, Sam, why I feel that 3½ years of my best effort is worth money. All you

> have to do is just look up my past earning power which you will find when I worked was well over $50,000 per annum and I surely worked for 3½ years on this deal.
>
> Now all I want is a fair and equitable settlement and let's get down and figure it out.

In all of this there is not a suggestion of a joint venture, nothing from which to infer that Wilson was sharing a risk of loss or was asserting a right to a voice in the control of the property. Here, as in his deposition, there is at most a claim to share in the profits of the sale of the land, as compensation for his past services.

The other evidence is likewise contrary to the claim of joint venture. A letter, apparently from Agnew, dated July 9, 1947, in reply to Wilson's letter of April 16, 1947, last quoted above, completely rejected his claim (R. 385-386). The answer and cross complaint in the California lawsuit, also completely denied the existence of a joint venture (Ex. 2, Appendix, *infra*).

Even the specific allegations in the complaint filed by Wilson in the state court action (Appendix, *infra*), as distinguished from the general legal conclusions asserted therein, refute the notion that the parties were joint venturers and are entirely consistent with the view that Wilson performed services for Agnew for a compensation measured by a percentage of the profits from resales. While the complaint alleges (Par. III) that there was "an oral agreement of joint adventure" in describing the terms of the alleged arrangement, there is no reference to a possible sharing of losses. Moreover, the gen-

eral allegations in the complaint characterizing the relationship of the parties as that of joint venturers is entitled to no greater probative force for purposes of determining the taxable nature of the settlement proceeds than Agnew's unequivocal denial of those allegations in his answer (Appendix, *infra*), especially since the settlement agreement itself (R. 184-186) contains no indication of the basis of the compromise or the nature of the settlement payment.

In Agnew's deposition (R. 187-225), taken in connection with the present tax case, he testified that his arrangement with Wilson was that Wilson bought timber and sold it to him (R. 192, 199, 200, 220), and that Wilson was to be paid by the seller of the timber (R. 195, 204). He testified also that he purchased the timber for manufacturing and not for resale (R. 198), and that Wilson was opposed to the purchase of timber at tax sales and had little to do with such purchases (R. 193, 197, 204, 216).

Similarly in testifying in the California case in November, 1949 (R. 100-183), Agnew testified that he bought timber from Wilson (R. 104, 113), that there was no discussion of any deal of disposing of timberland at a profit (R. 109), that he was buying the timber for manufacture and not for resale (R. 113), that Wilson was to get his commission from the seller (R. 126), and that Wilson was a broker (R. 125, 180). As to the tax sales, Agnew testified that Wilson recommended against the purchase (R. 115, 116, 123, 125) but that after Agnew had decided to go ahead Wilson was given permission to

do the bidding and handle the transfer as a means whereby Wilson could build up his reputation (R. 125, 126, 137, 147).

In the trial of the present case, one witness with whom Wilson negotiated testifed that he held himself out as agent for Agnew (R. 63, 64, 65) and that as seller he did not pay Wilson a commission (R. 76). See also Exhibit W (R. 402-407).

There is in the testimony of Agnew nothing from which could be drawn an inference that Wilson had any interest at all in the timber after it was purchased by Agnew, far less that it could be an interest of a joint venturer.

On the crucial questions of sharing of losses and of joint power of control of the property, there is not only no conflict of evidence, there is no evidence whatever. Such conflict as there is exists with respect to the question whether Wilson was to receive any compensation at all from Agnew, or was to get his compensation from the sellers. Indeed, there is some indication in Wilson's own testimony that in some cases at least he made a profit independently by purchasing timber and reselling it to Agnew (R. 289-293).

In short, not only is there no evidence to contradict the Commissioner's determination that the amount received by Wilson in 1949 was compensation for personal services, rather than a distribution of assets held by a joint venture; the evidence overwhelmingly supports the Commissioner's determination. Accordingly, we respectfully submit that the conclusion of the court below that

a joint venture existed is clearly erroneous, as a matter of law, even under the facts of this case taken most favorably to the taxpayers. Taxpayers clearly failed to meet their burden of showing that the Commissioner's determination was wrong.

B. Even assuming that a joint venture existed, the court below erred in concluding that the settlement proceeds represented a property division rather than damages for loss of profits.

Even assuming, *arguendo,* that a joint venture was created, the District Court erred in further concluding that the value of the property received by Wilson in settlement of the state court litigation represented a nontaxable division in kind of the assets of the joint venture, rather than damages for loss of profits resulting from Agnew's alleged breach of the alleged oral joint venture agreement. While it is arguable that the allegations in Wilson's complaint were broad enough to encompass both theories of recovery, the crucial fact remains that the settlement agreement is silent as to the basis for the compromise. Taxpayer, of course, had the burden of proving that the settlement proceeds constituted a nontaxable division of properties owned by Wilson and Agnew as joint venturers, rather than a recovery of the proceeds which he claimed would have been earned by the joint venture but for Agnew's violation of the alleged joint venture agreement. On the record here presented that burden clearly has not been met.

It is not disputed that if the property Wilson received in the settlement was in lieu of profits its value was income to Wilson in 1949 and taxable to him as such. *H. Liebes & Co. v. Commissioner,* 90 F. 2d 932 (C. A. 9th). Taxpayers argued below, however, that the conveyance to Wilson was part of a division in kind of the assets of a joint venture (R. 25, 28) and therefore that under Section 29.113(a)(13)-2 of Treasury Regulations 111 (*supra*) no gain or loss was realized. In determining this question, in the light of the state court litigation, both Commissioner and taxpayers in the court below relied on the principle that whether the net proceeds of litigation are taxable to the recipient as income or constitute a nontaxable return of capital "depends upon the object for which the suit was brought." If brought to recover "lost profits, the proceeds are taxable as income;" if brought "for loss or damage to capital, the proceeds are nontaxable." *Durkee v. Commissioner,* 162 F. 2d 184, 186 (C. A. 6th). See also *H. Leibes & Co. v. Commissioner, Supra; Raytheon Production Corp. v. Commissioner,* 144 F. 2d 110, 113 (C. A. 1st), certiorari denied, 323 U. S. 779; *Arcadia Refining Co. v. Commissioner,* 118 F. 2d 1010 (C. A. 5th); *Farmers' & Merchants' Bank v. Commissioner,* 59 F. 2d 912, 913 (C. A. 6th); *Jones v. Corbyn,* 186 F. 2d 450 (C. A. 10th). Where, for example, the settlement of a patent infringement suit represents lost profits rather than damage to capital, the recovery is taxable income. *United States v. Safety Car Heating Co.,* 297 U. S. 88; *Mathey v. Commissioner,* 177 F. 2d 259 (C. A. 1st). Where the basis of the compromised claim is not an injury to capital but default in the

payment of money or delivery of property which would clearly have been gain in the first instance, the settlement cannot be said to be in restoration of capital. *Swastika Oil & Gas Co. v. Commissioner,* 123 F. 2d 382, 384 (C. A. 6th). In determining the nature of the recovery, the courts look at the claims of the plaintiff in the prior lawsuit. *Lyeth v. Hoey,* 305 U. S. 188; *Helvering v. Safe Deposit Co.,* 316 U. S. 56; *Commissioner v. Goldberger's Estate,* 213 F. 2d 78 (C. A. 3d); *Farmers' & Merchants Bank v. Commissioner, supra.*

Taxpayers in the court below argued in effect that in the tax case the court is bound by the labels placed on the claims in the prior suit. We do not read the cases as so restricting the court in the subsequent tax case. Rather that the court can look at the earlier case to see what it was that the taxpayer was really looking for. In *Lyeth v. Hoey,* 305 U. S. 188, 197, the Court emphasized that in the earlier action the plaintiff was taking more than merely a "bargaining position." "He was an heir in fact." See also *Mathey v. Commissioner, supra; Durkee v. Commissioner, supra;* and see *Parr v. Scofield,* 185 F. 2d 535, 536-537 (C. A. 5th).

In determining the nature of Wilson's claim in the state proceedings, the stipulation for settlement (R. 185-186) is completely inconclusive. It provides for the transfer from Agnew to Wilson of the tracts of land here in question. It also called for the transfer by Wilson to Agnew of the Thorp tract, which Agnew in his cross complaint (Par. II, Appendix, *infra*) alleged that Wilson had purchased in his own name with Agnew's money. It also called for the release of all claims of each against the

other, resulting in the retention by Wilson of $25,000 advanced by Agnew for a deal which fell through (R. 300-301). The stipulation does not recite the contentions of the parties or the basis of the settlement. Similarly the testimony in the present case of Agnew's attorney as to the reason for the settlement is inconclusive (R. 68, 74-75). Nowhere is there any recognition of Wilson as having a property interest in a joint venture.

Furthermore, examination of the amended complaint itself (Ex. 2, Appendix, *infra*) makes it abundantly clear that the true nature of Wilson's claim was for profits. The complaint (Par. III) repeatedly recites that the lands were purchased for resale "at a profit," that they were to be sold within a reasonable time "for profit" that "such profits" were to be divided equally in the case of lands purchased at tax sales, and that "all profits" from the sale of other lands were to be divided, 80% to Agnew and 20% to Wilson. Wilson complained that the lands could have been sold "at a large profit," that he could sell them "at a large and substantial profit," and that Agnew had "deprived plaintiff of the expected profits and the profits that he is entitled to * * *" (Par. VII). Wilson's prayer for relief was in substance that he receive a portion of the lands in question to the extent of his interest therein, i.e., a percentage of the profit, or that in the event of sale he receive the specified percentages of the amount received after deducting Agnew's expenses, i.e., the profit.

Even if it be assumed therefore that the arrangement between the two amounted to a joint venture, it is clear

that what Wilson was seeking was not a division of the assets of the joint venture but a division of its (unrealized) profits. Again assuming that there was a joint venture, it is clear that Wilson was not claiming an interest in the assets themselves, but only in the lost profits. On Wilson's own statement of the arrangement between the two, if there were no profits he had no claim for anything.

Unlike cases like *Durkee v. Commissioner, supra; Jones v. Corbyn, supra,* and *Mathey v. Commissioner, supra,* where the problem was one of determining whether a recovery should be attributed to loss of profits or to impairment of a capital asset, here Wilson had no capital asset. There was no going business, goodwill, patent or other asset which had been impaired, and which had now been made whole. If it be argued that Wilson's interest in the alleged joint venture was itself a capital asset, we then are brought back to the fact that that interest was only a claim to damages for loss of profits never realized by the joint venture, and that the recovery was merely a satisfaction of the claim to profits. That Wilson received property (in lieu of cash) in settlement of his claim does not transform the value of the property received from taxable income into a nontaxable distribution in kind of the assets of a joint venture.

In the tax cases cited above, the courts have looked at the earlier litigation in order to determine the issue before them—what is the true nature of the recovery, does it represent income or the return of capital? If we

do the same here, it is evident that the nature of the recovery is one for profits, and is income and not the return of capital.

CONCLUSION

The decision of the court below should be reversed and the case remanded for a determination of the fair market value of the property received by the decedent.

Respectfully submitted,

JOHN N. STULL,
Acting Assistant Attorney General.
ROBERT N. ANDERSON,
HARRY BAUM,
DAVID O. WALTER,
Attorneys,
Department of Justice,
Washington 25, D. C.

C. E LUCKEY,
United States Attorney.
EDWARD J. GEORGEFF,
Assistant United States Attorney.

AUGUST, 1956.

APPENDIX

Plaintiff's Exhibit 2

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF DEL NORTE.

SAMUEL J. WILSON, Plaintiff,	)	
v.	)	NO. 4060
	)	AMENDED COMPLAINT
SAMUEL A. AGNEW, Defendant.	)	

Now comes the above-named plaintiff, and for cause of action against the defendant herein alleges:

I

That for a great many years prior to the date of an agreement hereinafter alleged, plaintiff has from time to time followed the occupation of cruising of timber for the purpose of ascertaining the quantity and quality of merchantable and useable lumber therein; that during said period of time he was and is familiar with fir and other varieties of timber; that from his work, experience and knowledge he was able to ascertain the quality and quantity of growing timber, its accessibility for logging for the manufacture thereof into timber products, and was generally familiar with the business of buying and selling timber and timberlands, determining the quantity of timber upon lands and its possibility for profitable use in the manufacture of its products.

II

That for a number of years prior to the time hereinafter alleged, the defendant, SAMUEL A. AGNEW, operated mills for the manufacture of lumber, dealt in timberlands, and at the time of the agreement hereinafter alleged, and for a considerable period of time prior thereto, wanted to acquire interest in timberlands in the States of California and Oregon for the resale thereof at a profit.

III

That on or about the 15th day of May, 1943, the plaintiff, SAMUEL J. WILSON, and the defendant, SAMUEL A. AGNEW, made and entered into an oral agreement of joint adventure by the terms of which said plaintiff and defendant mutually agreed that plaintiff would search for and examine various timberlands, locate the same, determine their suitability for purchase for logging for the manufacture of lumber or resale at a profit, and would ascertain from public records, particularly in the County of Curry, Oregon, and the Counties of Del Norte, Trinity, and Humboldt, California, descriptions of lands that might be purchased by plaintiff and defendant from the States of Oregon and California, or counties or other political subdivisions thereof, secure the offering of such lands by such governmental agencies holding title thereto, bring about the sale of said lands by such states, counties, or political subdivisions thereof according to the governing law pertaining thereto and bid for such timberlands at such sales for the joint use and benefit of plaintiff and defendant. It was mutually agreed that plaintiff was to purchase, if the

price thereof did not exceed Five Dollars ($5.00) per acre, for the joint use and benefit of plaintiff and defendant such timberlands in the State of California and Oregon, some of which lands had theretofore been acquired by the aforesaid states, counties or political subdivisions thereof by reason of taxes having been unpaid and delinquent thereon, or would acquire timber and timberlands at tax sales, and that the plaintiff and defendant would negotiate for, attempt to acquire and acquire timberlands in the States of California and Oregon, which lands were designated as privately owned lands, from the owners thereof. Plaintiff was to approach the owners of such privately owned land for the purpose of ascertaining if said lands were for sale at a price that would permit plaintiff and defendant to purchase them and resell them within a reasonable time at a profit and, if so, to acquire such privately owned timberlands. It was understood and agreed between plaintiff and defendant that any and all said lands so purchased by the plaintiff and defendant was to be sold within a reasonable time for profit; it was agreed between plaintiff and defendant that the defendant, from his own funds, was to advance the purchase price of all such lands purchased pursuant to the terms of such oral agreement, and to thereafter pay taxes accruing or accumulating on said lands during the period of time such timberlands were so held, and that upon the sale of said timber and timberlands pursuant to such agreement and at a profit, there was first to be deducted from the sale price thereof any sums advanced by defendant for the purchase of said lands or in the payment of taxes, to-

gether with interest thereon, at the rate of five per cent (5%) per annum. That such profits so accruing from said sales of any timberlands acquired by plaintiff and defendant under such joint adventure agreement that had been acquired from any state, county or political subdivision of any state at tax sale or which was purchased from any state, county or political subdivision of any state which had acquired such timberlands for delinquent taxes were to be divided equally between the plaintiff and defendant, and that all profits derived from the purchase and sale of timberlands by plaintiff and defendant from private owners were to be divided on the basis of eighty per cent (80%) thereof to the defendant, SAMUEL A. AGNEW, and twenty per cent (20%) of such profit to plaintiff. It was agreed that plaintiff would look for purchasers and negotiate for the sale of such timberlands so acquired, and that plaintiff would do and perform any and all other necessary work and labor required of him in connection with the purchasing and disposing of said timberlands.

IV

That after the making of the above described oral agreement of joint adventure between plaintiff and defendant, and in pursuance and performance of such agreement, plaintiff, at his own cost and expense, maintained an office, employed secretarial help, maintained a telephone, conducted correspondence, cruised, and caused to be cruised, timberlands, caused such timberlands to be surveyed, searched public records to determine what timberlands might be purchased from states, counties or political subdivisions thereof, and what tim-

berlands might be sold by such governmental agencies on account of unpaid delinquent taxes, went upon and examined numbers of tracts of timberlands, assembled small, variously owned tracts of timber into blocks of timber so that the same might be suitable for logging operations or resale, secured rights of way, travelled to various places to interview the owners of privately owned timberlands, and since on or about May 15, 1943, has devoted practically all of his time to the performance of carrying out the purposes and objects of such agreement, and continued to perform many other and numerous items and details necessary and required in the negotiating and consummating the acquisition of the timberlands hereinafter described. For the purpose of carrying out and putting into effect such joint adventure agreement, plaintiff has expended a large amount of time, effort and money.

V

That in pursuance and in the performance of said agreement, and with the moneys advanced by defendant, and as the result of the performance of the terms of the above agreement, the plaintiff and defendant have acquired and now hold, subject to the terms of their joint adventure agreement as hereinbefore alleged, timber, timberlands and premises located in the Counties of Del Norte, Trinity, and Humboldt, California, and in Curry County, Oregon; said timber and timberlands are more particularly described in "Exhibit A" attached hereto and made a part hereof, in which tax title land and land acquired from private owners are particularly designated. All of such timber and timberlands are held sub-

ject to the terms of their joint adventure. Title to all of said lands was taken in the name of the defendant, who holds the title thereto, for the use and benefit of the joint adventure in accordance with the terms thereof, and as a trustee for plaintiff to the extent of plaintiff's interest therein. In each instance in which any timberlands were purchased, plaintiff handled the entire transaction together with all of its details, and directed that the title be taken in the name of the defendant for the purposes of such joint adventure and at all times until the breach of said agreement by defendant, as hereinafter alleged, defendant acknowledged and recognized that he held the title to such timberlands for the use and benefit of plaintiff and defendant, and as a trustee for plaintiff. That there are located and growing upon said timberlands approximately one billion, two hundred million feet of standing merchantable timber. That all of such timber purchased from states, counties or political subdivisions thereof, or by reason of tax sales, was purchased at less than Five Dollars ($5.00) per acre. That the cost of such timber and timberlands, together with the taxes accruing thereon, and paid by defendant, does not exceed the sum of $400,000. Such timber and timberlands herein described and referred to and purchased in accordance with the agreement of the parties herein described now have a fair market value of approximately $6,000,000.

VI

That on or about July 2, 1946, defendant denied the existence of any joint adventure agreement with plaintiff, refused to recognize any such agreement, denied

plaintiff had any right, title, interest or claim to the timber or timberlands above described, wrongfully failed and refused to further carry out or perform such joint adventure agreement, wrongfully failed and refused to buy or sell any timber or timberlands, ceased to be associated with plaintiff in the carrying on of the business of the joint adventure agreement, has prevented plaintiff from further performing said joint adventure agreement and has appropriated the timber and timberlands above described to his own uses and purposes to the exclusion of plaintiff. Plaintiff has many times since demanded of defendant, that defendant perform and carry out said joint adventure agreement, recognize his right, title and interest in and to the above described timber and timberlands and has repeatedly demanded of defendant an accounting of the business transactions, advances and expenditures of the joint adventure agreement made by defendant, all of which demands have been wrongfully refused by defendant.

VII

That ever since on or about July 2, 1946, said timber and timberlands could have been advantageously sold at a large profit. A reasonable time has elapsed since the purchase of such timber and timberlands, and plaintiff has been ever since July 2, 1946, and now is able, ready and willing to sell said timberlands for and on behalf of plaintiff and defendant, at a large and substantial profit. In spite of the demands made upon defendant by plaintiffs, defendant has in all respects failed to carry out or perform any of the terms of such joint adventure and has been guilty of a breach thereof,

and a breach of trust, as aforesaid; all of such conduct on defendant's part is without any just cause or reason thereby depriving plaintiff of his rights under said joint adventure agreement to the timber and timberlands purchased pursuance thereto, and has deprived plaintiff of the expected profits and the profits that he is entitled to under such agreement and because of his labors, efforts, and expenditures in connection with the performance thereof.

VIII

Plaintiff has done and performed all things by him to be performed and done under the terms of the joint adventure agreement by him and is now able, ready and willing to do and perform any other matters and things required of him under such agreement. All conditions precedent have been performed and have occurred.

WHEREFORE, plaintiff prays for a decree of this Court against the defendant as follows:

I

That the joint adventure of plaintiff and defendant be established and plaintiff's interest in the above-described premises, timber and timberlands be determined.

II

That the title to all of the above-described premises, timber and timberlands, whether standing in the name of the defendant herein, or otherwise, and that plaintiff's interest in, claim to, or equitable title be determined and ascertained, liquidated and sold pursuant to the order of the Court, or it be divided in kind.

III

That a full and complete accounting be had between the parties hereto.

IV

That in the event of the liquidation or sale of the premises, timber and timberlands hereinbefore described, that one-half of the fair cash market value thereof, which was acquired by the plaintiff and defendant through tax or tax title proceedings and twenty per cent (20%) of the fair cash market value of lands acquired from private parties, after deducting any and all sums properly due to the defendant herein, be ordered and decreed paid to plaintiff.

V

That the plaintiff herein have such other relief as may be just, equitable, and meet in the premises.

/s/ C. E. H. Maloy
/s/ William W. Speer

Attorneys for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF DEL NORTE

FILED
JUL 15 1949
EMMA COOPER
County Clerk
By EC
Deputy

SAMUEL J. WILSON, Plaintiff,
vs.
SAMUEL A. AGNEW, Defendant.

No. 4060

SAMUEL A. AGNEW, Defendant and Cross-Plaintiff,
vs.
SAMUEL J. WILSON, Plaintiff and Cross-Defendant.

ANSWER TO AMENDED COMPLAINT AND CROSS-COMPLAINT

Now comes the above named Defendant, Samuel A. Agnew, and for cause of answer to said Amended Complaint, denies, admits and alleges as follows, to wit:

I.

Denies that he has any knowledge or information sufficient to form a belief as to the truth of any of the allegations in Paragraph I of said Amended Complaint and denies upon information and belief each and all of the allegations as set forth in Paragraph I of said Amended Complaint.

II.

Admits that for a number of years prior to the time alleged in said Amended Complaint that the Defendant

operated mills for the manufacturing of lumber and dealt in timberlands; admits that at the time of the purported agreement hereinafter alleged (in said Amended Complaint) and for a considerable period of time prior thereto, Defendant wanted to acquire interest in timberlands in the States of California and Oregon, but denies that he wanted to acquire them for the resale thereof at a profit, and in this connection alleges that any timber or timberlands that Defendant acquired in the State of California or the State of Oregon were for the purpose of manufacturing the same into lumber and timber products, and that he never wanted to or acquired any timber or timberlands in California or Oregon for the purpose of reselling the same for a profit.

III.

Denies each and all of the allegations of Paragraph III of said Amended Complaint.

IV.

Denies that he has any knowledge or information sufficient to form a belief as to the truth of any of the allegations in Paragraph IV of said Amended Complaint contained, and basing his denial upon information and belief, denies each and all of the allegations in Paragraph IV of said Amended Complaint.

V.

Answering Paragraph V of said Amended Complaint, Defendant denies each and every allegation therein contained, save and except that he admits that he advanced moneys to Plaintiff for the purchase of said timberlands and that title to all of said lands described in said

Amended Complaint was taken in the name of the Defendant and that he holds the title thereto.

VI.

Answering Paragraph VI of said Amended Complaint, Defendant denies each and every allegation therein contained, save and except that he admits that he has refused and still refuses to recognize any right, title or interest of Plaintiff in and to any of the lands mentioned and described in the Amended Complaint growing out of the alleged contract between Plaintiff and Defendant or otherwise or at all, and alleges that no such contract was ever entered into between Plaintiff and Defendant.

VII.

Answering Paragraph VII of said Amended Complaint, Defendant has not sufficient knowledge or information to form a belief as to whether said timber and/or timberlands or any portion thereof could have been sold at a profit or at all and denies each and every other allegation contained therein, save and except that he admits that he has refused and still refuses to carry out the alleged agreement between Plaintiff and Defendant and that no such agreement was ever made and entered into between the parties.

VIII.

Answering Paragraph VIII of said Amended Complaint, Defendant denies each and every allegation therein contained and the whole thereo. (sic)

AND FOR A FURTHER, SEPARATE AND SECOND CAUSE OF DEFENSE to said Amended Complaint, the Defendant alleges:

I.

That on the 2nd day of July, 1946, and at all times thereafter, the Plaintiff had full and actual knowledge of each and every one of the facts set forth in the said Amended Complaint herein.

II.

That this action was not commenced within two years from the date the 2nd day of July, 1946, the time when Plaintiff had full and actual knowledge of said facts as aforesaid and is barred by the provisions of subdivision 1 of Section 339 of the Code of Civil Procedure of the State of California.

AND FOR A FURTHER, SEPARATE AND THIRD DEFENSE to said Amended Complaint, the Defendant alleges:

I.

That the purported joint adventure agreement mentioned in said Amended Complaint in this action and by which this Defendant is sought to be charged, was and is by its terms, not to be performed within one year from the making thereof; that said purported joint adventure agreement was never in any writing subscribed by the Defendant, or his agent, and that there is not now, nor was there ever any note or memorandum thereof subscribed by Defendant or by his agent, and is barred by the provisions of subdivision 1, 4 and 5 of Section 1973 of the Code of Civil Procedure of the State of California.

AND FOR A FURTHER, SEPARATE AND FOURTH CAUSE OF DEFENSE to said Amended Complaint, the Defendant alleges:

I.

That the Plaintiff ought not to be admitted or allowed to allege that he is the owner or has any right, or title or claim whatever to any of the timber or timberlands described in said Amended Complaint for the reasons hereinafter alleged. That on or about the spring or summer of 1943, Defendant and Plaintiff entered into an oral agreement whereby Plaintiff would sell Defendant and Defendant would purchase from Plaintiff, timber and timberlands in Del Norte, Trinity and Humboldt Counties in California and Curry County, Oregon, and it was further agreed that when and at such times as Plaintiff had timber and/or timberlands for sale held in private ownership, he would advise Defendant of that fact and submit a description of the timber and timberlands to Defendant and the price which Defendant was to pay Plaintiff therefor, and Defendant agreed that he would investigate the lands as to location, accessibility, the kind, quality and quantity of the timber located thereon and if the location of the lands, the kind, quality and quantity of the timber and the price for which Plaintiff would sell such timber and timberlands were satisfactory to Defendant, Defendant would advance Plaintiff the purchase price thereof.

That in pursuance and in accordance with said oral agreement, Defendant advanced and paid to Plaintiff for the purchase of said timberlands, the sum of $350,-196.72 or thereabouts and that of said sum Plaintiff wrongfully, knowingly and with intent to defraud and without the consent or knowledge of Defendant, used the sum of more than $30,500.00 for the purchase of

timber for his own use and benefit and has wrongfully, fraudulently and with intent to defraud and deceive, had the title vested in himself and in his own name and which Plaintiff now holds title to and claims as his own. That said Plaintiff has further wrongfully, knowingly and with intent to defraud and without the knowledge or consent of Defendant, diverted to his own use and benefit the sum of $154,675.23 which Defendant advanced to him for the purchase of timberlands and which moneys Plaintiff has refused and now refuses to account to Defendant for.

CROSS - COMPLAINT

That for a cross-complaint, the Defendant alleges:

I.

That on or about the spring or summer of 1943, Defendant and Plaintiff entered into an oral agreement whereby Plaintiff would sell Defendant and Defendant would purchase from Plaintiff, timber and timberlands in Del Norte, Trinity and Humboldt Counties in California and Curry County, Oregon, and it was further agreed that when at such times as Plaintiff had timber and/or timberlands for sale held in private ownership, he would advise Defendant of that fact and submit a description of the timber and timberlands to Defendant and the price which Defendant was to pay Plaintiff therefor, and Defendant agreed that he would investigate the lands as to location, accessibility, the kind, quality and quantity of the timber located thereon and if the location of the lands, the kind, quality and quantity of the timber and the price for which Plaintiff would

sell such timber and timberlands were satisfactory to Defendant, Defendant would advance Plaintiff the purchase price thereof.

II.

That in pursuance and in accordance with said oral agreement, Plaintiff and cross-defendant offered to Defendant and Cross-Plaintiff for purchase of the following described lands situated in the County of Del Norte, State of California,

Parcel One

N½ of NE¼; SW¼ of NE¼; SE¼ of NW¼ Section 13; S½ of NE¼; NE¼ of NE¼ Section 19; SE¼ of SE¼, Section 18; S½ of SW¼ Section 17; N½ of NW¼; E½ of SE¼ Section 20; S½ of SW¼, Section 21; E½ of SE¼; E½ of NE¼, Section 26; N½ of SE¼; SW¼ of SE¼; NE¼ of SW¼ Section 27, all in Township 15 N., R. 3 E., H. M., Del Norte County, California, according to the Government map and survey by the United States.

Parcel Two

SE¼ Section 12; E½ of SE¼ Section 17; E½ of NE¼ Section 17; SW¼ of SE¼ Section 17; NW¼ of NE¼ Section 20; S½ of NE¼ Section 20; W½ of SE¼; SW¼ of NE¼; SE¼ of NW¼ Section 26; NE¼ Section 27; NE¼ of NW¼ Section 27; SE¼ of SW¼; S½ of SE¼ Section 22; SE¼ Section 23, all in Township 15 N, R. 3 E., H.M.; in Del Norte County, California, according to the Government map and survey by the United States.

then owned by Gilbert Thorp Land Co., Inc., a New York corporation, and represented to Defendant and Cross-complainant that the price for said timberlands

would be $20,800.00 and that thereupon Defendant and Cross-complainant investigated said timberlands and was satisfied with the quality, quantity and location of said timber and did on or about the 24th day of May, 1946, accept said offer and paid to said Plantiff and Cross-defendant the sum of $20,800.00 for the purchase price of said timber and for title insurance which said Plaintiff and Cross-Defendant represented that he would supply.

III.

That contrary to the terms of said agreement and for the purpose of defrauding and swindling Defendant and Cross-plaintiff, said Samuel J. Wilson, Plaintiff and Cross-defendant caused the title to said property above described to be placed in his own name, and took title thereto in his own name and has excluded Samuel A. Agnew, Defendant and Cross-complainant from any right, title or interest therein or the possession thereof and claims title and ownership of said premises.

IV.

That on or about the 15th day of Sept., 1947, Defendant and Cross-plaintiff for the first time discovered that title to the herein described real property and possession thereof had been takn by the said Samuel J. Wilson, Plaintiff and Cross-defendant and purchased with the funds provided him by Defendant and Cross-complainant as hereinafter alleged.

That prior to said date the said Samuel J. Wilson, Plaintiff and Cross-defendant concealed from Defendant and Cross-complainant the fact that he had taken title

to said premises in his own name and claimed title thereto contrary to the terms of said agreement.

V.

That by reason of said wrongful and unlawful actions of said Samuel J. Wilson, Plaintiff and Cross-Defendant, he has held and ever since the said date of said purchase, has held the title to said real property in his own name as trustee for said Samuel A. Agnew, Defendant and Cross-complainant.

AS A SECOND, FURTHER AND SEPARATE CAUSE OF CROSS-COMPLAINT, Defendant and Cross-complainant alleges:

I.

Hereby refers to as if repeated herein word for word and makes a part of this second, further and separate cause of cross-complaint, paragraph I of said first cross-complaint.

II.

That in pursuance and in accordance with the said oral agreement, Plaintiff and Cross-defendant offered to Defendant and Cross-plaintiff for purchase the following described timberlands situated in the County of Curry, State of Oregon, known as the Clutter tract and owned by various persons. That said timberlands are particularly described as follows, to wit:

> NE¼ of the SE¼ of Section 22; the W½ of the SW¼ of Section 23; the W½ of the NW¼ of Section 26; the E½ of the NE¼; the E½ of the NW¼ and the SE¼ of the SE¼ of Section 27, Township 36, S R 14, W. W. M., in the County of Curry, State of Oregon.

and represented to Defendant and Cross-complainant that said timberlands could be purchased and that thereupon Defendant and Cross-complainant investigated said timberlands and was satisfied with the quality, quantity and location of said timber and did prior to the 15th day of May, 1946, and paid to said Plaintiff and Cross-defendant the purchase price therefor and as represented by him.

III.

That contrary to the terms of said agreement and for the purpose of defrauding and swindling Defendant and Cross-plaintiff, said Samuel J. Wilson, Plaintiff and Cross-defendant caused the title to said property above described to be placed in his own name, and took title thereto in his own name and has excluded Samuel A. Agnew, Defendant and Cross-complainant from any right, title or interest therein or the possession thereof and claims title and ownership of said premises, and has sold a portion of the timber from said premises and obtained the proceeds therefor.

IV.

That on or about the 19th day of Sept., 1947, Defendant and Cross-plaintiff for the first time discovered that title to the herein described real property and possession thereof had been taken by the said Samuel J. Wilson, Plaintiff and Cross-defendant and purchased with the funds provided him by Defendant and Cross-complainant as hereinafter alleged.

That prior to said date the said Samuel J. Wilson, Plaintiff and Cross-defendant concealed from Defendant

and Cross-complainant the fact that he had taken title to said premises in his own name and claimed title thereto contrary to the terms of said agreement.

V.

That by reason of said wrongful and unlawful actions of said Samuel J. Wilson, Plaintiff and Cross-defendant, he has held and ever since the said date of said purchase, has held the title to said real property in his own name as trustee for said Samuel A. Agnew, Defendant and Cross-complainant.

AS A THIRD, FURTHER AND SEPARATE CAUSE OF CROSS-COMPLAINT, Defendant and Cross-complainant alleges:

I.

Hereby refers to Paragraph I of the first cause of action alleged herein, as if repeated herein word for word, and makes the same a part of this third, separate and further cause of action.

II.

That in pursuance and in accordance with said oral agreement, Defendant and Cross-plaintiff advanced and paid to Plaintiff and Cross-defendant, on or about and between the Spring of 1943 and the 1st day of January, 1947, for the purchase of timberlands which Plaintiff and Cross-defendant represented that he could obtain and convey to Defendant and Cross-plaintiff, the sum of approximately $350,196.72 and that of said sum, Plaintiff and Cross-defendant has wrongfully, knowingly, intentionally and with intent to defraud and without

the knowledge or consent of Samuel A. Agnew, Defendant and Cross-plaintiff, diverted from said moneys so advanced and paid him, to his own use and benefit, the sum of $165,021.49 which Defendant and Cross-plaintiff advanced to him for the purchase of timberlands and which moneys Plaintiff and Cross-defendant, Samuel J. Wilson, has refused and now refuses to account to Samuel A. Agnew, Defendant and Cross-plaintiff, for.

AS A FOURTH, SEPARATE AND FURTHER CAUSE OF CROSS-COMPLAINT, Defendant and Cross-complainant alleges:

I.

That on or about the 1st day of September, 1943, Defendant and Cross-plaintiff, Samuel A. Agnew, as a result and through certain tax foreclosure proceedings had and done in the County of Curry, State of Oregon, purchased and paid for certain real estate sold at public auction by the authorities of Curry County, State of Oregon, and a part of the lands which he sold and acquired is described as follows, to wit:

Section 36, Township 37 S. Range 14 W. W. M. Curry County, State of Oregon.

That Defendant and Cross-plaintiff at the special instance and request of Plaintiff and Cross-defendant, Samuel J. Wilson, permitted and allowed said Plaintiff and Cross-defendant, Samuel J. Wilson, to bid in all of the said property at said tax foreclosure sale for Defendant and Cross-plaintiff, Samuel A. Agnew, and thereafter and wholly unknown to Defendant and Cross-plaintiff, Samuel A. Agnew, the said Plaintiff and Cross-

defendant, Samuel J. Wilson, wrongfully, unlawfully and surreptitiously and wholly unknown to said Defendant and Cross-plaintiff, Samuel A. Agnew, obtained from the County of Curry, State of Oregon, a deed for said lands above described herein. In said deed the said Plaintiff and Cross-defendant, Samuel J. Wilson, had himself named as trustee therein and thereafter the said Plaintiff and Cross-defendant, Samuel J. Wilson, and on the 11th day of September, 1943, conveyed by deed to the Evans Products Company, a corporation, all of the cedar timber standing, lying and being upon said lands and as the consideration for said deed, the said Evans Products Company, a corporation, conveyed to Defendant and Cross-plaintiff, Samuel A. Agnew, by deed, all of the fir timber lying and being upon the following described lands, to wit:

> Said lands in Section 2, Township 38, N. Range 14 W. W. M; also Section 35, Township 37, N. Range 14 W. W. M; also Section 34, Township 37, N, Range 14 W. W. M., Curry County, Oregon.

and in addition thereto, the said Evans Products Company, a corporation, paid to the said Plaintiff and Cross-defendant, Samuel J. Wilson, the sum of $6,000.00 in cash.

II.

That Plaintiff and Cross-defendant, Samuel J. Wilson, at all times represented to Defendant and Cross-plaintiff, Samuel A. Agnew, that the exchange of the cedar timber upon the lands mentioned and described, was made for the fir timber upon the lands last mentioned and described and that there was no further con-

sideration passing from the Evans Products Company, a corporation, for such transfer; and the said Plaintiff and Cross-defendant, Samuel J. Wilson, appropriated and converted the said sum of $6,000.00 to his own use and for his own purposes and wholly failed to disclose to Defendant and Cross-plaintiff, Samuel A. Agnew, that he had received as part of the consideration for such transaction the sum of $6,000.00 paid by the Evans Products Company, a corporation.

III.

That all the cedar timber upon the land conveyed to Evans Products Company, a corporation, and hereinabove described, was owned by Defendant and Cross-plaintiff, Samuel A. Agnew, and the said Plaintiff and Cross-defendant, Samuel J. Wilson, had no right, title, interest or equity therein.

IV.

That Defendant and Cross-plaintiff, Samuel A. Agnew, did not learn and had no knowledge of the wrongful and unlawful actions of the said Plaintiff and Cross-defendant, Samuel J. Wilson, as hereinabove in this cause of action set forth, until on or about the 1st day of September, 1947.

WHEREFORE, Defendant and Cross-plaintiff, Samuel A. Agnew, prays judgment as follows:

a. That Plaintiff's complaint be dismissed with prejudice and that he take nothing thereby and that Defendant have his costs.

As to the first cross-complaint, Defendant prays judgment as follows:

A. That this Court find that with respect to the lands described in the first cross-complaint, that a trust exists as a result of which said Plaintiff and Cross-defendant, Samuel J. Wilson, holds title to said lands in his name as trustee for the use and benefit of Defendant and Cross-plaintiff, Samuel A. Agnew. That said Plaintiff and Cross-defendant, Samuel J. Wilson, be required to transfer the said title to said lands to Defendant and Cross-plaintiff, Samuel A. Agnew, and terminate the trust. That the title to said lands be found to be in Defendant and Cross-plaintiff, Samuel A. Agnew, and that Plaintiff and Cross-defendant, Samuel J. Wilson, be required by Decree of this Court to transfer the said title thereto to Defendant and Cross-plaintiff, Samuel A. Agnew. And for his costs of suit herein.

As to the second cross-complaint, Defendant prays judgment as follows:

A. That this Court find that with respect to the lands described in the second cross-complaint, that a trust exists as a result of which said Plaintiff and Cross-defendant, Samuel J. Wilson, holds title to said lands in his name as trustee for the use and benefit of Defendant and Cross-plaintiff, Samuel A. Agnew. That said Plaintiff and Cross-defendant, Samuel J. Wilson, be required to transfer the said title to said lands to Defendant and Cross-plaintiff, Samuel A. Agnew, and terminate the trust. That the title to said lands be found to be in Defendant and Cross-plaintiff, Samuel A. Agnew, and that Plaintiff and Cross-defendant, Samuel J. Wilson, be required by Decree of this Court to transfer the said

title thereto to Defendant and Cross-plaintiff, Samuel A. Agnew. And for his costs of suit herein.

As to the third cross-complaint, Defendant and Cross-plaintiff, Samuel A. Agnew, prays judgment as follows:

A. That Defendant and Cross-plaintiff, Samuel A. Agnew, have judgment against the said Plaintiff and Cross-defendant, Samuel J. Wilson, for the sum of $165,021.49, and his costs of suit herein, and for an accounting of all moneys advanced and paid to Plaintiff and cross-defendant.

As to the fourth cross-complaint, Defendant and Cross-plaintiff, Samuel A. Agnew, prays judgment as follows:

A. That Defendant and Cross-plaintiff, Samuel A. Agnew, have judgment against the said Plaintiff and Cross-defendant, Samuel J. Wilson, for the sum of $6,000.00 together with interest thereon and costs and disbursements of this action.

And for such other and further relief as to the Court seems meet and proper in the premises.

/s/ Irwin T. Quinn
Attorney for Defendant and
Cross-Plaintiff.